Supreme Court, U.S.
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CASE NO. 87-407

in the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD ARTHUR OFSHE

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

REPLY BRIEF OF PETITIONER

MELVIN S. BLACK
Grove Forest Plaza, Suite 202
2937 S.W. 27th Avenue
Miami, Florida 33133
Attorney for Petitioner
(305) 443-1600

QUESTIONS PRESENTED

I.

WHETHER IT IS OUTRAGEOUS GOVERNMENT MISCONDUCT WHEN A PROSECUTOR USES A DEFENSE ATTORNEY AS A CONFIDENTIAL INFORMANT AGAINST HIS CLIENT WHILE THE DEFENSE ATTORNEY IS REPRESENTING THAT CLIENT IN A PENDING CRIMINAL PROSECUTION

II.

WHETHER PREJUDICE SHOULD BE PRESUMED WHEN THE INVASION OF THE ATTORNEY/CLIENT RELATIONSHIP CONSISTS OF THE GOVERNMENT CREATING A CONFLICT BY TURNING A DEFENSE ATTORNEY INTO A GOVERNMENT INFORMANT AGAINST HIS OWN CLIENT

TABLE OF CONTENTS

	Page
Questions Presented	i
Argument	2
Conclusion	4

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ARGUMENT

The Respondent's Brief assumes that there was no intrusion into the attorney-client relationship between the Petitioner and his criminal defense attorney who was used by the Government as an informant against the Petitioner.[1] The Court of Appeals for the Eleventh Circuit has recently issued an order which seems to refute this assumption. (The unpublished order is included herein as an Appendix.) The order denied a motion of Scott Turow to amend the panel opinion in *United States v. Ofshe,* 817 F.2d 1508 (11th Cir. 1987). Turow, the former Assistant United States Attorney in the Northern District of Illinois, directed the actions of Marvin Glass while Glass was simultaneously defending the Petitioner on pending criminal charges and working as an informant against the Petitioner. Turow sought to amend the panel opinion of the Court

[1]The Respondent's Brief argues that "[t]here is nothing inherently outrageous in using as an informant a co-conspirator who happens to be the target's defense attorney, so long as there is no attempt to intrude into a protected attorney-client relationship and no intrusion results." (Brief of Respondent at 6-7).

of Appeals by deleting a footnote which described Turow's action as "reprehensible."[2]

In its order denying Turow's motion to amend the panel opinion, the Court of Appeals found that the prosecutor's action in permitting the defense attorney to become an informant against his client did in fact intrude into the attorney-client relationship by rendering the attorney ineffective.[3]

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[2]The panel opinion stated at 817 F.2d 1516, n. 6:

> While we have not found the government's conduct sufficiently outrageous to warrant the dismissal of his Indictment, we do believe that Glass' and Turow's conduct was reprehensible. Because the district judge is more familiar with the attorneys' conduct, we assume he will refer this matter to The Attorney Registration and Disciplinary Commission, 203 N. Wabash, Suite 1900, Chicago, Illinois 60601, for appropriate action.

[3]The Court of Appeals order found:

> In this case, the foreseeable result of Turow's conduct was that Glass' representation of Ofshe would be rendered ineffective. Indeed, Turow's own testimony reveals that he subjectively foresaw that very result. Turow testified that when he obtained permission for the electronic surveillance, his understanding was that Glass "was going to have to complete this and then withdraw from representing Ofshe." Thus Turow understood when he formulated the plan to monitor Ofshe's conversation with Glass that **the direct effect of the scheme would be to destroy Glass' effectiveness as counsel.** (App. 11).

The Respondent's reliance upon the Magistrate's finding that the government's actions "do not appear to have been deliberate attempts to infringe on or destroy the defendant's attorney-client relationship with Mr. Glass" is clearly misplaced in view of the recent finding by the Court of Appeals. (Brief of Respondent at 5).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MELVIN S. BLACK
Grove Forest Plaza, Suite 202
2937 S.W. 27th Avenue
Miami, Florida 33133
Attorney for Petitioner
(305) 443-1600

Appendix

[DO NOT PUBLISH]

[FILED NOV 16 1987]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5351

D.C. Docket No. 82-6129

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD ARTHUR OFSHE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(November 16, 1987)

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, Senior District Judge.

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*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

BY THE COURT:

Scott F. Turow has moved this court to amend its panel opinion in *United States v. Ofshe,* 817 F.2d 1508 (11th Cir. 1987), *petition for cert. filed,* 56 U.S.L.W. 3195 (U.S. Sept. 29, 1987) (No. 87-407), so as to remove what he contends is an inappropriate reference to his conduct in the events underlying that case. We deny the motion.

In *Ofshe,* the defendant, Ronald Ofshe, had been indicted on drug charges in the Southern District of Florida. He sought dismissal of the indictment on the ground that his attorney, Marvin Glass, had acted as a government informant against him during the pendency of his case. Movant Turow, then an Assistant United States Attorney in the Northern District of Illinois, was the government official to whom Glass had tendered his services as an informant. This panel held that the sixth amendment did not require dismissal of Ofshe's indictment because Ofshe had not suffered demonstrable prejudice as a result of Glass' informant activities. We also held that Turow's conduct was not sufficiently outrageous to require dismissal of Ofshe's indictment on due process grounds. We nonetheless observed in a footnote that Glass and Turow had engaged in reprehensible conduct and that disciplinary action might be appropriate. This footnote, which Turow now asks us to delete, reads as follows:

> While we have not found the government's conduct sufficiently outrageous to warrant the dismissal of his Indictment, we do believe that Glass' and Turow's conduct was reprehensible.

> Because the district judge is more familiar with the attorneys' conduct, we assume he will refer this matter to The Attorney Registration and Disciplinary Commission, 203 N. Wabash, Suite 1900, Chicago, Illinois 60601, for appropriate action.

Ofshe, 817 F.2d at 1516 n. 6.

In his motion requesting us to strike the footnote, Turow argues that the issue of his ethical responsibilities as a prosecutor was never before the court. He concludes that the *Ofshe* panel violated his due process rights by "delivering [a] public censure . . . without notice to him that the ethical propriety of his conduct was under scrutiny and without permitting him to be heard."

I.

We reject Turow's arguments.[1] The reference to which he objects was made in connection with our determination that Turow's conduct was not sufficiently outrageous to warrant dismissal of Ofshe's indictment

[1]Turow was not a party to the proceedings below. Therefore, we view his present motion only as a request by a stranger to those proceedings, not as part of an Article III case or controversy. We do not comment on whether a remedy would be available to Turow in the context of a properly instituted adversarial proceeding.

on due process grounds. In making that determination, we engaged in a thorough review of the record on appeal. In light of the due process issue presented, our review by necessity focused specifically on Turow's conduct. It is therefore specious for Turow now to argue that his conduct was never an issue in the case.[2]

In his motion requesting us to amend the panel opinion, Turow seeks to justify his conduct by

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[2]In his motion to amend the opinion, Turow states that "[a]t no time before the issuance of this Court's opinion was it suggested by the United States Magistrate who heard Mr. Turow's testimony . . . that Mr. Turow may have violated any ethical precepts." In fact, the magistrate strongly condemned Turow's conduct. After describing the nature of Turow's contacts with Glass, the magistrate concluded with the following observation:

> [T]he right hand of the Government (the Illinois branch) was very busy trying to conduct undercover business in south Florida without letting the left hand of the Government (the South Florida branch) know what it was doing. When the right hand finally had to confront the left hand, they apparently decided to try to wash both hands and wipe the resulting grime on a towel to be put into a sealed hamper that neither the defendant nor the prosecutor nor even the defendant's local counsel could see into.

In the magistrate's view, "[w]hat the Government did and the method used to fulfill their purpose, was at times half-baked, certainly not well-planned, clearly improperly supervised and undoubtedly ill-omened." In oral argument before this court, the Government did not dispute the magistrate's characterization of Turow's conduct. Indeed, the Government stated that "[w]e agree—we have no problem with the magistrate's ruling on this in which she said it was horrible and nasty and all that. I can assure you we will try not to have it happen again."

emphasizing that it resulted in no violation of Ofshe's constitutional rights. We find this argument to be specious as well. Surely Turow cannot seriously contend that a prosecutor's conduct is immune from attack on ethical grounds so long as it is not so outrageous as to rise to the level of a due process violation.

Finally, we reject outright the notion that a federal court cannot comment as it sees fit on the ethical shortcomings of the attorneys who practice before it. The footnote to which Turow objects is very similar to the closing comment by the Supreme Court in *United States v. Morrison,* 449 U.S. 361, 101 S.Ct. 665 (1981). In that case, the Supreme Court concluded that a prosecutor's invasion of the defendant's attorney-client relationship did not warrant dismissal of the defendant's indictment. The Court noted, however, that "[i]n arriving at this conclusion, we do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings." *Id.* at 367, 101 S.Ct. at 669. Like the Supreme Court in *Morrison,* we are not inhibited from commenting on the misconduct of federal prosecutors, especially when that misconduct underlies a central issue in the case. Thus we stand by our view that disciplinary action may be in order. As we stated in our panel opinion, we defer that decision to the appropriate authorities.

II.

While we are troubled by the ethical ramifications of Turow's conduct, our concern runs deeper. Based on the record before us, we believe that Turow may have

committed an obstruction of justice in violation of 18 U.S.C. § 1503 (1982).

A.

The facts of the case are recited in the panel opinion. Ofshe was arrested and indicted in Florida in December 1982 for possession with intent to distribute cocaine. Immediately after his arrest, Ofshe retained the services of Mel Black, who acted as counsel throughout the proceedings before the district court. In December 1982, Ofshe hired Marvin Glass to serve as co-counsel. Black and Glass agreed that Black would prepare the case for trial while Glass would handle all communications with the government, including plea negotiations.

In early April 1983, having learned that he was the target of an investigation by the United States Attorney's Office in the Northern District of Illinois, Glass approached investigators in that office and offered his services as an informant. Thereafter, beginning on April 19, 1983, Glass periodically met with Assistant United States Attorney (AUSA) Scott F. Turow of the Chicago office and provided him with information concerning suspected drug traffickers.

The details of Glass' contacts with Turow were brought to light at the hearing held in connection with Ofshe's motion to dismiss. Although he was aware that Glass was an attorney, Turow testified that he did not know about Glass' involvement in the Ofshe case until June 8, 1983. At a meeting on that date with Turow, Glass mentioned Ofshe as a possible target, and informed Turow that he was representing Ofshe in the

case pending in the Southern District of Florida. Turow nonetheless encouraged Glass to continue as an informant, although he cautioned him not to reveal the content of any privileged communication with Ofshe. Glass proceeded to tell Turow about a money-laundering scheme involving persons he had met through Ofshe; Glass also told Turow that Ofshe had sought his help in locating a buyer for a large quantity of marijuana. Turow and Glass then discussed the possibility of planting a Nagra body bug on Glass in order to monitor conversations between Glass and Ofshe.

On June 10, 1983, after consulting with superiors in Chicago, Turow decided to proceed with the plan to monitor Ofshe's conversations with Glass. Sometime between June 10 and June 14, federal agents contacted Glass and elicited his consent to the plan. Turow testified that the agents were told to give Glass strict instructions not to violate the attorney-client privilege during the monitored conversation.

Glass, equipped by federal agents with a body bug, met with Ofshe on June 14, 1983. Their monitored conversation contained no discussion of Ofshe's pending prosecution other than references to matters that were part of the public record. The entire surveillance occurred without the approval or knowledge of AUSA R. Michael Hursey, the prosecutor handling Ofshe's case in the Southern District of Florida.

Turow testified that Glass had been told before June 14 that he would have to withdraw as Ofshe's counsel in the pending case once the surveillance was over. Glass remarked to the federal agents who wired him

for the surveillance that the case against Ofshe had been dropped. The agents relayed that remark to Turow, who apparently accepted it as true. In any event, Turow did not pursue the matter of Glass' withdrawal at that time.

In fact, the case pending against Ofshe had not been dropped. Between April 19, 1983, the date of the first meeting between Glass and Turow, and June 14, 1983, the date of the electronic surveillance, the trial of the case was continued on two occasions. The first motion for continuance was filed on April 22, 1983 by co-counsel Black, who testified that the motion "was prepared . . . in response to the call that Mr. Glass had made to my office . . . wherein Mr. Glass told my secretary that we should move for a continuance . . . based upon continuing plea negotiations," which apparently were being handled by Glass. The motion contained a waiver of speedy trial which, according to Black, was also included pursuant to Glass' instructions. The district court granted the motion on April 25, and reset the case for the trial calendar commencing May 31, 1983.

On June 2, 1983, the district court ordered a second continuance at the joint request of the parties. In its order, the court stated that the purpose of the continuance was to enable the parties to complete plea negotiations. The court reset the case for the trial calendar commencing June 27, 1983.

Black testified that Glass telephoned him on June 21, 1983, one week after the electronic surveillance, with instructions to file yet another motion for continuance. Black filed the motion on June 22, 1983. This motion, like the two earlier motions, stated that

the defendant needed more time to complete plea negotiations. The district court granted the motion on June 23, 1983, and reset the case for the trial calendar commencing July 25, 1983.

On July 28, 1983, the parties finally appeared in court for trial. Glass and AUSA Hursey, conferring out of the presence of Ofshe and Black, reached an agreement whereby Hursey would request dismissal of the indictment in exchange for Ofshe's promise to provide information to the government. Glass also advised Hursey that if the government decided to reinstitute proceedings against Ofshe at a later date, Ofshe would waive indictment and submit to trial on an information. Hursey thereupon moved the district court to dismiss the indictment without prejudice, and the court granted the motion.

Proceeding by an information based on the charges contained in the December 1982 indictment, the Government reinstituted criminal proceedings against Ofshe on August 12, 1983. Glass continued to represent Ofshe, notwithstanding his earlier promise to Turow that he would withdraw. Turow testified that he did not learn that Glass was still representing Ofshe until August 30, 1983. At that time, Turow contacted Glass and instructed him to withdraw. Glass resisted, and continued to resist in spite of further communications from Turow reminding him of his earlier commitment to withdraw once the electronic surveillance had been completed.

Meanwhile, the district court, still unaware of Glass' informant status, continued the trial of the case until

February 1984. In February 1984, Turow disclosed the matter to the district judge in an in camera hearing. Glass then filed a motion in the district court requesting the court to enforce a purported agreement between Turow and Glass whereby Turow had promised Glass complete confidentiality. The district court denied the motion, and this court affirmed. *In re Anonymous,* No. 84-5540 (11th Cir. Feb. 27, 1985) (per curiam). Glass ultimately withdrew as Ofshe's counsel on April 13, 1984. Because the court file for *In re Anonymous* was sealed, neither Ofshe nor Black knew Turow's in camera disclosure to the district court, why Glass had taken the appeal, or why Glass had withdrawn. Black and Ofshe did not learn of Glass' informant activities until February 16, 1985, when Black was alerted to the matter by a letter from Joseph McSorley, Chief Assistant United States Attorney in the Southern District of Florida.

B.

The three elements of a section 1503 offense are that "the accused (1) corruptly or by threats, (2) endeavored, (3) to influence, obstruct, or impede the due administration of justice." *United States v. Silverman,* 745 F.2d 1386, 1392 (11th Cir. 1984). The kinds of conduct prohibited under section 1503 includes any "corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed." *Id.* at 1393. With respect to the scienter element, "[t]he government is not required to prove . . . that the defendant harbored the specific purpose of obstructing the due administration of justice; all the government has to establish is that

the defendant should have reasonably foreseen that the natural and probable consequence of the success of his scheme would achieve precisely that result." *Id.*

In this case, the foreseeable result of Turow's conduct was that Glass' representation of Ofshe would be rendered ineffective. Indeed, Turow's own testimony reveals that he subjectively foresaw that very result. Turow testified that when he obtained permission for the electronic surveillance, his understanding was that Glass "was going to have to complete this and then withdraw from representing Ofshe." Thus, Turow understood when he formulated the plan to monitor Ofshe's conversation with Glass that the direct effect of the scheme would be to destroy Glass' effectiveness as counsel.

In light of his understanding of the matter, Turow could anticipate that his conduct would result in one of three scenarios. In the first scenario, Glass immediately moves the district court to permit him to withdraw as Ofshe's counsel. Glass, however, does not reveal to the court the true reason for his seeking to withdraw, and instead proffers some fabricated reason. The court, accepting the fabricated reason on its face but finding it insufficient to justify withdrawal, denies the motion. Ofshe never learns of Glass' informant activities. Thus, the ineffective assistance for which Turow shares responsibility is perpetuated. In effect, Turow and Glass are responsible for an involuntary waiver by Ofshe of his right to the effective assistance of counsel. Corruptly coercing a defendant to waive a constitutional right during a judicial proceeding violates section 1503. *See Silverman,* 745 F.2d at 1394.

The second scenario is like the first, except that Glass reveals to the court the full truth about his informant activities and the court grants the motion to withdraw. The court then conducts an examination of co-counsel Black to determine whether his representation is also defective. If the court finds that it is, trial of the case will be delayed while Ofshe obtains new counsel. Further, Ofshe might seek to have his indictment dismissed on sixth amendment or due process grounds. These events would burden the court and cause an expenditure of scarce resources that would not otherwise have occurred. We believe that this is the kind of burden to the administration of justice that Congress sought to prevent with section 1503.

In the third scenario, Turow instructs Glass to withdraw but Glass resists doing so. Believing that he can optimize his own position with the government by continuing to pump information from Ofshe, he seeks to delay Ofshe's trial as long as possible. He repeatedly moves the district court to continue the case, each time citing some fabricated reason. The court grants the continuances. Glass eventually does withdraw as counsel, but after the case finally goes to trial, Ofshe learns of Glass' informant activities and seeks to have his indictment dismissed. Again, these events singularly and collectively waste scarce judicial and parajudicial resources and impede the due administration of the court's calendar.

In our opinion, the three scenarios illustrate that Turow should have reasonably foreseen that the natural and probable consequence of the success of his scheme to monitor Ofshe's conversations with Glass would be

to impede the due administration of justice in violation of section 1503. When a federal court becomes aware of conduct that may be criminal, it is duty bound to alert the appropriate authorities. Accordingly, we direct the Clerk to forward a copy of this order to the United States Attorney for the Southern District of Florida, since the conduct described herein occurred within his district.